



January 2, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AC02; Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Exemptions.

Dear Assistant Secretary Gomez:

On November 3, 2023, the Department of Labor’s Employee Benefits Security Administration (EBSA) published a proposed rule titled “Retirement Security Rule: Definition of an Investment Advice Fiduciary.”¹ The rule would expand the definition of an “investment advice fiduciary” for purposes of Title I and Title II of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA concurrently published proposed amendments to several administrative exemptions from the prohibited transaction rules that provide relief to investment advice fiduciaries, including Prohibited Transaction Exemption (PTE) 84-24 and PTE 2020-02 (together, the proposed rule).² This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy is concerned that the initial regulatory flexibility analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA).³ Specifically, the IRFA does not adequately estimate the costs of the proposal or the number of small entities that would be impacted by it. Furthermore, given the broad reach and the anticipated costs of this proposal, the IRFA does not adequately consider or explain significant alternatives which could accomplish EBSA’s stated objectives while minimizing the significant economic impact of the proposal on small entities.

¹ 88 Fed. Reg. 75890 (proposed Nov. 3, 2023).

² *Id.*

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

In addition, as detailed in a letter to EBSA dated December 20, 2023, Advocacy is concerned that the public has not been given sufficient time to analyze and provide meaningful comment on such a complex proposal.⁴ Small business stakeholders have told Advocacy that the proposed rule is likely to increase the costs associated with providing financial advisory services. These small firms and solo practitioners believe that the proposed rule could limit their ability to offer holistic investment advice and recommend the products most suitable to their clients' needs. Stakeholders also believe that the proposed rule is likely to create barriers to entry into the profession, at a time when both individuals and small businesses lack access to sound financial advice. Because of the short time frame to review the rule, however, small businesses that provide financial advice have not had sufficient opportunity to assess the impact of the rule on their portfolios and clients.

For these reasons, Advocacy recommends that EBSA prepare and make available for public comment a supplemental IRFA. To give small entities adequate resources to review the proposal, the supplemental IRFA should clearly outline any changes to its analysis or new information and allow a minimum of 60 additional days for public comment.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act,⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁶ If a rule will not have a significant economic impact on a substantial number of

⁴ See U.S. Small Bus. Admin, Off. of Advoc., Comment Letter Requesting Extension of Comment Period for Proposed Rule for Retirement Security Rule: Definition of an Investment Advice Fiduciary and Related Exemptions, (Dec. 20, 2023), <https://advocacy.sba.gov/2023/12/20/advocacy-requests-comment-period-extension-on-dol-eb-sas-proposed-retirement-security-rule/>. Advocacy notes that its extension request letter is one of 18,273 comments received on the proposed rule that have not yet been posted to the docket. To date, only 95 of the 18,368 comments submitted to the docket have been posted for public review. The ability to review and consider comment submissions is an integral part of the notice and comment process. EBSA's undue delay in posting comments has further hindered the public's ability to effectively comment on the proposed rule.

⁵ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁶ 5 U.S.C. § 603.

small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”¹¹

B. The Proposed Rule

On November 3, 2023, EBSA published the proposed rule which would update and expand the regulatory definition of an investment advice fiduciary for purposes of Title I and Title II of ERISA.¹² In conjunction with this broadened fiduciary definition, EBSA has proposed amendments to several administrative exemptions from the prohibited transaction rules that provide relief to investment advice fiduciaries.¹³ These changes would heighten the requirements and thereby narrow the availability of PTEs 75–1, 77–4, 80–83, 83–1, 84–24, 86–128, and 2020–02.¹⁴

Under the existing investment advice fiduciary definition, a person is a fiduciary only if they meet all of the elements of the following five-part test: (1) they render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.¹⁵

The proposed rule would amend this definition so that a person would be an investment advice fiduciary if they provide investment advice or make an investment recommendation to a “retirement investor,”¹⁶ the advice or recommendation is provided “for a fee or other

⁷ *Id.* § 605(b).

⁸ *Id.*

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹² Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023).

¹³ *See id.*

¹⁴ Additional information on the proposed amendments to the Prohibited Transaction Exemptions was concurrently published in the *Federal Register*. *See* Prohibited Transaction Exemption 2020–02, 88 Fed. Reg. 75979 (Nov. 3, 2023); Prohibited Transaction Exemption 84–24, 88 Fed. Reg. 76004 (Nov. 3, 2023); and Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128, 88 Fed. Reg. 76032 (Nov. 3, 2023).

¹⁵ 88 Fed. Reg. at 75,892.

¹⁶ A “retirement investor” is a “a plan, plan fiduciary, plan participant or beneficiary, [Individual Retirement Account (IRA)], IRA owner or beneficiary, or IRA fiduciary.” *Id.* at 75,900.

compensation, direct or indirect,” as defined in the proposed rule, and the person provides the advice or makes the recommendation in one of the following contexts:

- 1) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control;
- 2) The person either directly or indirectly makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by that investor as a basis for investment decisions in the investor’s best interest; or
- 3) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.¹⁷

In short, the proposed rule broadens the circumstances under which a professional would be considered an investment advice fiduciary by removing the “regular basis,” “mutual agreement,” and “primary basis for investment decisions” components of the existing definition, each of which implicates aspects of the professional’s relationship with the investor. Instead, the new definition would hinge on whether the professional makes “investment recommendations to investors on a regular basis as part of their business.” As a result of the amendment, one-time advice could be subject to the fiduciary standard in many circumstances.

Additionally, the proposed rule would narrow the availability and increase the required conditions of certain PTEs that currently apply to investment advice transactions.¹⁸ The proposal would limit relief under PTE 84-24 to independent insurance agents that recommend annuities or other non-securities insurance products from an unaffiliated insurance company to retirement investors on a commission or fee basis.¹⁹ This change would require many small firms that currently seek relief under PTE 84-24 in connection with the receipt of commissions for the sale of annuities and insurance products to instead attempt to meet the conditions of PTE 2020-02. At the same time, the proposed rule would increase the burdens associated with meeting PTE 2020-02, among them additional disclosure conditions including those associated with rollover recommendations.²⁰ The proposal would also amend PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 to eliminate relief for transactions resulting from fiduciary investment advice.²¹

The proposed rule includes an initial regulatory flexibility analysis.²² In its IRFA, EBSA states that it “believes the costs associated with the proposed amendments are modest because the proposal was developed in consideration of other regulatory conduct standards” and that it “does not expect that the proposal will impose a significant compliance burden on small entities.”²³

¹⁷ *Id.*

¹⁸ *Id.* at 75,890.

¹⁹ *See id.* at 75,913; Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004.

²⁰ *See* 88 Fed. Reg. at 75,913; Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979.

²¹ 88 Fed. Reg. at 75,913; Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128, 88 Fed. Reg. 76032.

²² 88 Fed. Reg. at 75,964-76.

²³ *Id.* at 75,968.

Nevertheless, the IRFA estimates that the combined amendments in the proposed rule will “impose costs of approximately \$253.2 million in the first year and \$216.2 million in each subsequent year, of which approximately \$248.0 million in the first year and \$212.7 million in each subsequent year would be imposed on small financial institutions.”²⁴ Although the IRFA includes descriptions of estimated costs for each entity type for each PTE, it does not analyze the cost impact by firm size.²⁵

The IRFA includes a description of regulatory alternatives considered as required by section 604 of the RFA.²⁶ This subsection, however, only examines two specific alternatives that would minimize the cost burden to small entities: not amending PTE 2020–02 and exempting small firms from disclosing the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020–02.²⁷ EBSA did not consider any regulatory alternatives associated with the broader changes to the investment advice fiduciary definition or the remaining PTEs.

II. Advocacy’s Small Business Concerns

Advocacy’s principal concern is that the IRFA found in the proposed rule is deficient. Under the RFA, an IRFA must contain:

- 1) A description of why the regulatory action is being taken.
- 2) The objectives and legal basis for the proposed regulation.
- 3) A description and estimated number of regulated small entities.
- 4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
- 5) Identification of duplication, overlap, and conflict with other rules and regulations.
- 6) A description of significant alternatives to the rule.²⁸

First, Advocacy is concerned that the IRFA underestimates the economic impact of the rule to regulated small entities because it inadequately describes the number of affected small entities and potential impacts to those entities. Second, Advocacy believes the IRFA does not adequately discuss specific alternatives that might reduce the impacts on small entities.

A. The Proposed Rule Underestimates the Economic Impact to Small Entities

The IRFA found in the proposed rule does not adequately estimate the economic impact to small entities. As noted in the IRFA, the proposed amendments would regulate industries primarily composed of small entities.²⁹ Given the scope of the proposal and the number of small entities

²⁴ *Id.*

²⁵ *Id.* at 75,968-76.

²⁶ *Id.* at 75,976.

²⁷ *Id.*

²⁸ 5 U.S.C. § 603.

²⁹ EBSA has estimated that the following percentages of affected entities are small: 97 percent of broker-dealers, 99 percent of registered investment advisers, 82 percent of insurance companies, 99 percent of independent producers, 93 percent of pension consultants that serve the retirement market, 97 percent of the investment company principal underwriters and investment company principal underwriters for IRAs, 76.5 percent of commercial banks, and 98 percent of mutual fund companies. In addition, 99 percent of captive insurance agents affected by the rulemaking

that would be impacted, the IRFA should include more data and analysis to provide the public with sufficient information on the economic impact of the proposed rule. To that end, Advocacy has identified several deficiencies in the IRFA.

First, Advocacy is concerned that the IRFA in the proposed rule does not adequately describe the number of regulated small entities. The number of regulated small entities is based on assumptions made regarding the total number of impacted entities identified in the proposed rule's regulatory impact analysis (RIA).³⁰ Advocacy is concerned that the assumptions made in the RIA may be inaccurate because EBSA does not fully explain them or their connection to the rule.³¹ Further, the IRFA does not provide additional information necessary to understand the impact of the rule, such as a breakdown of affected entities into smaller size groups (e.g., by revenue).

To improve the accuracy of the agency's estimates, Advocacy suggests using data from the U.S. Census Bureau, including the Statistics of U.S. Businesses (SUSB)³² and Nonemployer Statistics (NES)³³ databases. NES may be a particularly useful data source, as the impacted entities include solo advisers who do not have employees. These databases show the total number of firms, establishments, and receipts subdivided by North American Industry Classification System code (2-digit sector for NES and 6-digit industry for SUSB).

Second, Advocacy believes EBSA understates the costs of the regulation throughout its analysis. For instance, the agency fails to estimate enforcement costs. Small entities with employees and independent contractors must monitor and enforce compliance, even if the employees and contractors read and are trained on the rules, which comes with additional associated costs. EBSA should provide additional discussion of all costs that would be borne by small entities in association with the regulation.

Further, EBSA does not analyze the impact of costs to small entities relative to those of large entities. Small firms face disproportionate impacts from regulation because they lack the resources and operational scale necessary to absorb compliance costs. Many small entities are likely to face significant compliance costs associated with the proposed rule. Analysis of impacts by firm size will allow the agency to assess whether small firms can meet the requirements as proposed with the resources they have or through flexibilities where appropriate.

work for small entities. 88 Fed. Reg. at 75,965-68. Advocacy notes that EBSA's use of SBA small business size standards is appropriate for this rulemaking because those size standards accurately portray the proportion of small businesses in the regulated industries.

³⁰ *Id.* at 75,912-63.

³¹ For instance, EBSA "assumes that the number of independent producers selling annuities to the retirement market who would use the exemption under its proposed provisions would be about 10 percent of [the 40,000 independent property-casualty agents and brokers in the United States], or 4,000 independent producers." 88 Fed. Reg. at 75,936. The agency then states that this assumption is based on "anecdotal evidence." *Id.* The agency does not, however, reference the source of its anecdotal evidence or fully explain the connection between independent producers that sell annuities products and independent property-casualty agents and brokers.

³² See U.S. Census Bureau, *Statistics of U.S. Businesses* (Nov. 17, 2023), <https://www.census.gov/programs-surveys/susb.html>.

³³ See U.S. Census Bureau, *Nonemployer Statistics* (Nov. 13, 2023), <https://www.census.gov/programs-surveys/nonemployer-statistics.html>.

Small firms have told Advocacy that the compliance costs of the proposed rule are likely to create new barriers to entry, particularly for solo practitioners. These stakeholders generally agree that the rule will result in higher service costs and reduced product offerings. Small firms have expressed that they will be forced to pass on the costs of compliance to their customer base, decreasing the financial stability of low and moderate-income Americans and small businesses. If small firms are not able to pass on compliance costs to their customers, the proposed rule may result in market consolidation. A survey about the proposed rule by the National Association of Insurance and Financial Advisors (NAIFA) found that over 90 percent of members surveyed believe that the proposal will significantly increase the costs associated with providing disclosures, record-keeping, and hiring and training staff.³⁴ Those NAIFA members also reported that the rule would force them to impose or increase minimum asset thresholds on their clients.³⁵

The survey also echoed concerns Advocacy has heard from small firms that implementation of the rule would reduce their ability to offer fixed annuities and other non-securities investment products.³⁶ Small advisers and their representatives have relayed that an inability to provide these products would impede their ability to provide holistic financial advice to their clients.

For these reasons, EBSA must revise its IRFA to better identify the number and distribution of regulated small entities. The IRFA should also address the heightened cost burden faced by small entities by providing detailed information that will allow the agency to analyze the relative impact of costs based on entity size. This would help EBSA to understand the cost burden faced by the smallest regulated entities.

B. The Proposed Rule Does Not Adequately Consider Regulatory Alternatives that Will Lower the Burden to Small Entities

The RFA requires that an IRFA discuss significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact on small entities. In view of the broad reach of this proposed rule and the potentially high costs to small entities, the IRFA's examination of regulatory alternatives is insufficient.

EBSA's IRFA briefly discusses two regulatory alternatives: not amending PTE 2020-02 and exempting small firms from disclosing the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020-02.³⁷ Although the IRFA provides information on the cost savings to small entities associated with exempting them from the website disclosures, EBSA does not provide details on the cost savings associated with leaving PTE 2020-02 in its current form.³⁸

³⁴ See Nat'l Ass'n of Ins. & Fin. Advisors, *NAIFA Survey Shows the DOL's Fiduciary Proposal Will Increase Costs and Reduce Access to Retirement Planning Services* (Dec. 19, 2023), <https://advocacy.naifa.org/news/naifa-survey-shows-the-dols-fiduciary-proposal-will-increase-costs-and-reduce-access-to-retirement-planning-services>.

³⁵ *Id.* at 3.

³⁶ *Id.* at 7.

³⁷ 88 Fed. Reg. at 75,976.

³⁸ *Id.*

More importantly, the IRFA does not discuss regulatory alternatives to the main component of the proposed rule: amendment of the definition of an investment advice fiduciary.³⁹ EBSA also fails to discuss regulatory alternatives to the remaining PTE amendments.⁴⁰ The agency's failure to analyze significant alternatives to these components of the rule (e.g., exemptions or delayed compliance dates for small entities) has prevented the public from reviewing and commenting on measures that would reduce the costs of the regulation to small entities while simultaneously achieving the agency's goals.

To comply with the RFA, EBSA must revise its IRFA to include additional significant regulatory alternatives which accomplish its objectives for the rulemaking. The agency should discuss specific regulatory alternatives that address all major components of the proposed rule. Advocacy further encourages the agency to provide a detailed analysis of each potential alternative and discuss how that alternative may reduce the economic burden on small entities.

C. Advocacy's Recommendations

Advocacy is concerned that, because of deficiencies in the IRFA, the public has not been adequately informed about the possible impact of the proposed rule on small entities. Additionally, small entities have not been given sufficient information regarding less burdensome significant alternatives to the proposed rule that would meet EBSA's objectives.

For these reasons, EBSA must prepare and make available for public comment a supplemental IRFA. The supplemental IRFA should adequately describe the number of regulated small entities and estimate potential impacts to those entities. EBSA should provide detailed information that will allow the agency to analyze the relative impact of costs based on entity size. Further, the supplemental IRFA must include specific regulatory alternatives to the major components of the rulemaking which accomplish EBSA's objectives, as required by the RFA. Advocacy encourages EBSA to provide a detailed analysis of each potential alternative and to discuss how that alternative may reduce the economic burden on small entities.

III. Conclusion

Advocacy is concerned that the proposed rulemaking and IRFA lack essential information required by the RFA. EBSA must provide an adequate description of the number of affected small entities and a detailed analysis of the impact of the proposed rule to those small entities before proceeding to a final rule. EBSA must also explore specific regulatory alternatives that might reduce the significant economic impact to small entities. This analysis should be published in a supplemental IRFA to provide small entities an opportunity to comment. Because the public has not had sufficient opportunity to analyze the rulemaking and provide meaningful comment, the agency should allow a minimum of 60 additional days for public comment on the supplemental IRFA.

³⁹ *Id.*

⁴⁰ *Id.*

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
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/s/

Meagan Singer
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Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget